NO. 22567

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY SCOLARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED
APR 17 1968
WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, Jr.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

325 West F Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

NO. 22567

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY SCOLARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, Jr.,
United States Attorney,

PHILLIP W. JOHNSON,
Assistant U. S. Attorney

325 West F Street
San Diego, California 92101

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

Statutes

NO. 22567

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TONY SCOLARI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, at the conclusion of trial without a jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 545 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California [C.T. 2-3].[1/]

Count One charged that appellant and Judi Taylor, with intent to defraud the United States, knowingly and wilfully smuggled, and clandestinely introduced into the United States from Mexico, approximately 10,000 amphetamine tablets, 5,000 Seconal capsules, and 24 packages of Keith Formula, which merchandise should have been invoiced, and fraudulently and knowingly imported and brought said merchandise into the United States contrary to law, in that said merchandise had not been presented for inspection, entered, and declared as provided by United States Code, Title 19, Sections 1459, 1461, 1484, and 1485 [C.T. 2].

Count Two charged that appellant and Judi Taylor fraudulently and knowingly concealed, and facilitated the transportation and concealment of, approximately 10,000 amphetamine tablets, 5,000 Seconal capsules, and 24 packages of Keith Formula, which merchandise, as the defendants then and there well knew, had been imported and brought into the United States contrary to law, in that said merchandise had not been presented for inspection, entered and declared as provided by United States Code, Title 19, Sections 1459, 1461, 1484 and 1485 [C.T. 3].

1/ "C.T." refers to the Clerk's Transcript of Record.

Appellant waived the right to trial by jury on September 28, 1967 [C.T. 10]. Court trial of appellant commenced on September 28, 1967, before United States District Judge James M. Carter [R.T. 43].[2/] Appellant was found guilty as charged on that date [R.T. 98].

Thereafter, on November 6, 1967, appellant was committed to the custody of the Attorney General for treatment and supervision as a Youth Offender until discharged under 18 U.S.C.A. 5017(c) [C.T. 14]. Appellant filed a timely notice of appeal [C.T. 15].

III

ERROR SPECIFIED

Appellant specifies only one point upon appeal, contending that the trial Court committed error in the rejection of evidence of an extra-judicial statement allegedly made by a co-defendant who was not on trial.

IV

STATEMENT OF THE FACTS

Appellant and Judi Taylor entered the United States from Mexico in an automobile at San Ysidro, California, on April 15, 1967 [R.T. 44-45, 49-50]. Appellant, who appeared to be nervous, was the driver of the vehicle, which contained approximately 10,000 amphetamine tablets, 5,000 Seconal tablets, and 24 packages of Keith Formula. All of these items were in the spare tire of the vehicle [R.T. 44, 50, 54-59, 61-62].

2/ "R.T." refers to the Reporter's Transcript on Appeal.

Appellant testified that he had left Covina, California, with Judi Taylor in the automobile, which was his; that they arrived in Tijuana and he parked and locked the vehicle; that he kept the keys but had another set of keys under the hood; and that Miss Taylor knew that there were other keys under the hood [R.T. 73-77].

He also testified that he and Miss Taylor separated in Tijuana; that they agreed to meet in about two hours, when she finished shopping; that he went to several bars and got drunk; that he met Miss Taylor in a bar; and that they had been separated for approximately two hours [R.T. 77-80].

He testified that he proceeded to the expected location of the vehicle; that it was gone; that he found it at a place like a towing company and paid a parking fine; that he and Miss Taylor drove toward the border; and that he did not know how the contraband got into the spare tire [R.T. 80-83, 86].

Appellant had given a similar statement to Customs officers, except that he refused to state whether he separated from Miss Taylor in Tijuana [R.T. 65-67].

Miss Taylor was called as a witness by the Government, refused to answer certain questions, and was found to be in contempt of court [R.T. 47].

Appellant offered evidence of a statement allegedly made by Miss Taylor after the arrest. The hearsay objection to this proposed testimony by appellant was sustained [R.T. 84-85].

V

ARGUMENT

A. THE OBJECTION TO THE ATTEMPTED HEARSAY TESTIMONY WAS PROPERLY SUSTAINED.

Appellant contends that an extra-judicial confession by a third party is admissible in evidence in criminal cases. The law is to the contrary.

Donnelly v. United States, 228 U.S. 243, 272-277 (1913);

Jeffries v. United States, 215 F.2d 225, 226 (9th Cir. 1954);

Neal v. United States, 22 F.2d 52, 55 (4th Cir. 1927);

United States v. Mulholland, 50 Fed. 413, 416-19 (D.C., Kentucky 1892);

20 American Jurisprudence, p. 468.

"In this country there is a great and practically unanimous weight of authority in the state courts against admitting evidence of confessions of third parties, made out of court, and tending to exonerate the accused [citing numerous decisions] . . . .

"We do not consider it necessary to further review the authorities, for we deem it settled by repeated decisions of this court, commencing at an early period, that declarations of this character are to be excluded as hearsay."

Donnelly, supra, at pp. 273-76 (emphasis added).

Appellant suggests that the law should be changed. The United States Supreme Court has rejected this suggestion:

"'The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule, the value of which is felt and acknowledged by all.'"

Donnelly, supra, at pp. 277-78.

The opinion in United States v. Dovico, 261 Fed. Supp. 862 (S.D.N.Y. 1966), cited by appellant, states that "it can hardly be said that federal authority supports the admissibility of hearsay declarations against penal interest." (at p. 870).

It is ironical that appellant seeks to utilize a rule based upon the theory that declarations against pecuniary interest are likely to be reliable and trustworthy, as the only "witness" to the alleged statement was appellant himself. There is not the slightest presumption that a defendant's self-serving narration of another person's alleged confession will be more trustworthy and reliable than ordinary hearsay testimony.

Assuming, for purpose of argument only, that the ruling of the trial Court was not supported by the overwhelming weight of authority, it is respectfully submitted that the ruling was not prejudicial to appellant. The trial Judge concluded that appellant was committing perjury [R.T. 95]. Appellant could hardly expect to pull himself up by his own bootstraps by saying, in effect, "I'm telling the truth, and to prove that I'm telling the truth, I'll tell you that this girl confessed to me."

In view of the notorious propensity of marihuana and drug conspirators

to attempt to exonerate each other, with one person "taking the rap" for all, the rule suggested by appellant would not assist the ascertainment of truth in the courtroom, particularly when the vital avenue of cross-examination is blocked.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

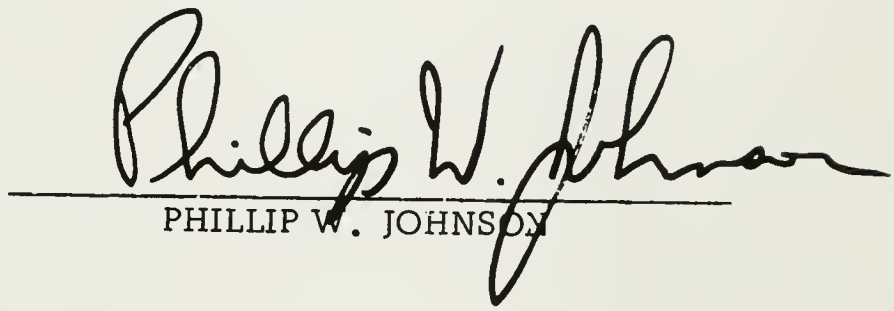
EDWIN L. MILLER, JR.
United States Attorney

PHILLIP W. JOHNSON
Assistant U.S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



PHILLIP W. JOHNSON